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Nos. 10-196 and 10-252

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, *et al.*,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

On Petitions For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF COLORADO, ALASKA, CALIFORNIA, FLORIDA, IDAHO, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH AND WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

States depend upon thousands of water transfers to move billions of gallons of water every day to meet the vital water supply needs of their residents. The Eleventh Circuit's decision with regard to the U.S. Environmental Protection Agency's Water Transfers Rule, however, has created substantial uncertainty regarding the regulation of such essential water transfers under the Clean Water Act. The question the Court should address is:

> Whether the lower court erred in failing to apply the "clear statement rule," which requires a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional State authority, thus allowing federal encroachment upon State water law and interference with interstate compacts, Congressional acts, and the Supreme Court's water apportionments.

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I. INTEREST OF *AMICI CURIAE*

The Attorneys General of the States of Colorado, Alaska, California, Florida, Idaho, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming ("*Amici* States") submit this brief as *Amici Curiae* pursuant to RULE 37.4 of this Court in support of the position of Respondents South Florida Water Management District, *et al.*, that the Court should grant the Petitions for a Writ of *Certiorari* to review *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g denied en banc*, 605 F.3d 962 (11th Cir. 2010).[1]

Amici States strongly believe that the lower court's decision conflicts with the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power . . . '[u]nless Congress conveys its purpose clearly.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 173 (2001) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). Despite the lack of "a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority" in the Clean Water Act ("CWA"), *Rapanos v. United States*, 547 U.S. 715, 738 (2006), the Eleventh

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[1] Counsel of record for all parties received timely notice of the *Amici Curiae's* intent to file this brief pursuant to RULE 37.2(a)

Circuit's ruling leaves the door open for the U.S. Environmental Protection Agency ("EPA") to impose permitting requirements on water transfers, threatening federal encroachment on the States' authority to allocate their water resources. *Friends of the Everglades*, 570 F.3d at 1227-28. No court has addressed the issue *Amici* States raise here: the relationship between the established federal-state framework of deference to State water law, the federalism principles at the heart of the CWA, and Congress's statements of intent in the CWA.

Using individual water allocations granted pursuant to State water law, countless public and private entities in the United States divert water from natural streams and lakes. Many then transfer water through man-made tunnels, canals, and pipelines into other natural streams and lakes to meet essential water needs of residents in other watersheds. Water transfers may be as simple as the diversion of water from a river into an adjacent (but hydrologically separate) stream for irrigation of a nearby field, or as complex as the interstate San Juan-Chama Project, which transfers water across the Continental Divide and across the Colorado-New Mexico state line. In the Upper Colorado River Basin alone, there are at least thirty-six major water transfers that move approximately 229 billion gallons of water per year from the basin of origin for use in another basin, often in another State.

The western part of the United States is generally arid; that is, western lands receive less than the thirty inches of annual precipitation necessary to

sustain non-irrigated agriculture. Because most precipitation in the West falls as snow, water must be captured when and where the snow melts in remote areas far from the major urban and agricultural centers that need the water. Hence, it is necessary to transfer water through complex systems of man-made and natural conveyances and reservoirs to places of need and use. These water transfers allow the West to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Basin of Idaho. Similarly, many of the West's great cities could not exist, including Albuquerque, Cheyenne, Colorado Springs, Denver, Los Angeles, Las Vegas, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, Seattle, and Tucson.

Water supply crises and issues are not unique to the arid West. Eastern States recently suffered from what the National Weather Service has characterized as the worst drought in more than a century, leaving them with dangerously low supplies of water. Consequently, a number of these States will become ever more reliant upon water transfers to meet the existing and increasing water needs of burgeoning populations in certain large cities and metropolitan areas. For example, Virginia Beach is wholly dependent upon an interbasin water transfer from Lake Gaston,

situated along the border of North Carolina and Virginia, as its primary water supply. Similarly, the Greenville water transfer, the largest transfer in South Carolina, conveys water from the Savannah River.

In short, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the United States, particularly the arid West.

II. REASONS FOR GRANTING *CERTIORARI*

There are three principal reasons this Court should grant the Petition. First, the Eleventh Circuit's decision conflicts with decisions of other circuits, thus creating uncertainty regarding the regulation of water transfers under the CWA. Second, the Circuit failed to apply the "clear statement rule," which requires a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional State authority. The lower court's error would authorize federal encroachment on State water law – contrary to the plain language of the CWA, as also recognized by this Court in other decisions involving the Act. Third, authorizing EPA to require National Pollutant Discharge Elimination System ("NPDES") permits for water transfers would empower EPA to interfere with interstate compacts, Congressional acts, and the Supreme Court's water apportionments.

III. ARGUMENT

A. The Court Should Grant *Certiorari* to Resolve a Conflict Among the Circuits and to Ensure Nationwide Uniformity in Federal Regulation of Water Transfers.

For many years, States have faced increasing uncertainty caused by litigation over the applicability of the CWA permitting requirements to water transfers. The First and Second Circuits have held that the plain language of the CWA requires NPDES permits for water transfers. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006).[2] The *Catskill* court also rejected deference to EPA's interpretation of the CWA. 451 F.3d at 83 n.5. In contrast, the Eleventh Circuit held that the CWA is ambiguous with regard to NPDES permitting of water transfers, and deferred to EPA. *Friends of the Everglades*, 570 F.3d at 1227-28.

As a result, NPDES permits are currently required for water transfers in the Second Circuit, but not required in the rest of the nation pursuant to the decision below and EPA's Water Transfers Rule ("Rule"). Moreover, the Rule itself is subject to

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[2] *Amici* States distinguish the discharge of produced waters from coal bed methane ("CBM") from water transfers that are at issue in this case *See, e.g., N. Great Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003) ("CBM water is a pollutant pursuant to the CWA.").

numerous challenges, coincidentally consolidated in the Eleventh Circuit. *Friends of the Everglades v. U.S. Envtl. Prot. Agency*, 08-13652-CC (11th Cir.) (consolidated with 08-13653-CC, 08-13657-CC, 08-14247-CC, 08-14471-CC, 08-14921-CC, 08-16270-CC, 08-16283-CC, 08-17189-CC, and 09-10506-CC). The consolidated litigation is stayed pending resolution of this appeal.[3] Order (Nov. 14, 2008), *id.* The *Amici* States firmly believe this question of the applicability of the CWA's permitting requirements to water transfers inevitably leads to this Court. *Amici* States therefore believe the Court should grant *certiorari* to resolve the continuing uncertainty in the interests of judicial efficiency and economy and to end this costly and burdensome litigation. Moreover, *Amici* States require certainty to plan and execute necessary water supply projects to meet the essential needs of their residents.

B. The Court Should Grant *Certiorari* to Address Application of the Clear Statement Rule to the Clean Water Act in Accordance With the Established Federal-State Framework of Deference to State Water Law.

The Eleventh Circuit employed a *Chevron* analysis to rule that the CWA is ambiguous with regard to

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[3] Adding to the uncertainty, EPA is reconsidering its Water Transfers Rule, which currently provides that NPDES permits are not required for water transfers. Resp. of U.S. to Pet for Reh'g at 15, *Friends of the Everglades*, 605 F 3d at 962.

whether the NPDES permitting program applies to water transfers and then deferred to EPA's current rule exempting water transfers from the program. *Friends of the Everglades*, 570 F.3d at 1227-28 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). In doing so, the Eleventh Circuit failed to insist on a clear and manifest statement from Congress authorizing an unprecedented intrusion into an area of traditional State authority – State water law. *See Rapanos*, 547 U.S. at 738. This is error as the CWA lacks a clear statement of Congressional intent to "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Quite the contrary, Congress expressed its clear intent to defer to State water law and specific State water allocations in the plain language of the CWA, an intent confirmed by the Act's legislative history. *See* 33 U.S.C. §§ 1251(b) and (g), 1370 (2010).

1. Congress Expressly Preserved the Established Federal-State Framework of Deference to State Water Law in the Text of the Clean Water Act.

As long understood and applied by the federal and State governments alike, land and water uses are traditionally and primarily State prerogatives. *SWANCC*, 531 U.S. at 174. The Supreme Court and

Congress have spoken with clear and consistent voices regarding deference to State water law.[4] For example, after Congress's 1972 adoption of the CWA and 1977 amendments, discussed below, the Supreme Court observed in *California v. United States*:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

438 U.S. 645, 653 (1978).

Unless Congress has expressed a clear intent for federal regulation in an area of traditional State authority – the "clear statement rule" – the Supreme Court has long and repeatedly warned against statutory interpretations that

> alter the federal-state framework by permitting federal encroachment upon a traditional state power. Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Thus, where an otherwise acceptable

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[4] Federal deference to State water law rests on the "equal footing" doctrine. Pursuant to that doctrine, Congress granted the States, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Fox River Paper Co. v R.R. Comm'n of Wisc*, 274 U.S 651, 655 (1927); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907).

> construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

SWANCC, 531 U.S. at 173 (citations omitted). *See also*, *Rapanos*, 547 U.S. at 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

Congress expressed its clear intent in the CWA to preserve, rather than alter, the established federal-state framework through purposeful and continued deference to State water law. 33 U.S.C. §§ 1251(b) and (g), 1370. In 1972, Congress incorporated its long-standing deference to State water law in § 510 of the CWA, stating, "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. At that time, Congress also expressed in § 101(b) a general policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of

land and water resources. . . ." 33 U.S.C. § 1251(b). Congress recognized that water and land use are inextricably intertwined. In adopting the CWA, Congress clearly intended that primary authority over such matters would continue to rest with the States.[5]

In the 1977 amendments to the CWA, Congress took the opportunity to reiterate and clarify its intent with respect to State authority over water quantity issues:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to

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[5] States can and do implement suitable controls that balance water supply and water quality considerations under State water law, authority explicitly recognized by the Act 33 U.S.C § 1370. For example, in California, water transfers are regulated under water allocation laws that may impose requirements to protect water quality, *e.g*, CAL WATER CODE §§ 1257, 1258 (2010), and under State water quality law, CAL. WATER CODE § 13000, *et seq* (2010) In Colorado, the State Water Quality Control Commission is authorized to adopt "control regulations" for activities that cause the quality of any State waters to be in violation of any applicable water quality standard. COLO. REV. STAT § 25-8-205(1)(c) (2010).

> develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g). Thus, Congress mandated not only deference to the States' water laws, but also respect for individual water rights determined pursuant to the States' water laws. To the extent water quality concerns arise in the context of water allocations, the CWA requires the federal government to cooperate with – not mandate – the States to develop comprehensive solutions. *Id.*

Notably, the 1977 amendments strengthened language adopted just five years earlier in §§ 101(b) and 510 that recognized federal deference to the States in the matter of State control over water quantity issues. Thus, over time, Congress reiterated and reinforced federal deference to State water law and water allocations.

In sum, the Eleventh Circuit adopted a construction of the CWA that would authorize EPA to "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power[,] . . . plainly contrary to the intent of Congress." *See SWANCC*, 531 U.S. at 173.

2. This Court has Repeatedly Acknowledged the Central Role of the States in Water Allocation and Pollution Control Matters.

In *South Florida Water Management District v. Miccosukee Tribe of Indians,* this Court acknowledged

the potentially far-reaching effects of requiring NPDES permits for water transfers:

> If we read the [Clean Water] Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado *et al.* as *Amici Curiae* 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

541 U.S. 95, 108 (2004). The Eleventh Circuit's construction of the the CWA is counter to this Court's express concerns about "the authority of each State to allocate quantities of water within its jurisdiction." This divergence highlights the importance of this issue for the nation.

The Eleventh Circuit's decision is also at odds with this Court's decision in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), a decision reinforced by *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). In

those cases, this Court affirmed the authority of States to impose State – not federal – water pollution controls on water allocations. Contrary to this established precedent, the decision below authorizes EPA to impose federal pollution controls on State water allocations.

In *PUD No. 1*, the State of Washington issued a § 401 water quality certification imposing a variety of conditions on a hydroelectric project, including a minimum stream flow requirement. 511 U.S. at 709. Similarly, in *S.D. Warren*, the State of Maine issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for migratory fish and eels. 547 U.S. at 375. As in *PUD No. 1*, the Supreme Court in *S.D. Warren* recognized that "[s]tate certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution." 547 U.S. at 386.

The Supreme Court also recognized that State imposition of water pollution controls under § 401 on State water allocations is entirely consistent with Congress's mandate in § 101(g) of the CWA, which expressly preserves "the authority of each State to allocate quantities of water within its jurisdiction." *PUD No. 1*, 511 U.S. at 720. In these instances, the States have been free to impose appropriate controls and conditions on water transfers that balance water supply and water quality considerations under State water law.

C. The Court Should Grant *Certiorari* to Prevent Interference With Interstate Compacts, Congressional Acts, and the Supreme Court's Water Apportionments.

Authorizing EPA to expand the NPDES program to include water transfers may interfere with the States' ability to use their full legal entitlement to scarce water under interstate compacts, Congressional acts, and the Supreme Court's water apportionments. If NPDES program requirements raise the costs of water distribution prohibitively, as this Court postulated in *Miccosukee*, States may not be able to transfer legally available water from one basin to another to meet their in-state demands – and their interstate obligations.

A significant number of water transfers occur on interstate stream systems, waters allocated among the States by interstate compact, Supreme Court decree, or Congressional act.[6] States may not be able to use their full legal entitlement to scarce water if they cannot transfer legally available water from one basin to another to meet demands. For example, Colorado uses portions of its Colorado River Compact entitlement to meet needs in the South Platte River and Arkansas River Basins. These basins lack

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[6] *See, e.g.*, Colorado River Compact, H. Con. Res. 6877, 67th Cong., 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); *Colorado v. New Mexico*, 459 U.S. 176 (1982), Boulder Canyon Project Act, 43 U.S.C. § 617 (2010) (allocating the lower Colorado River among Arizona, California, and Nevada).

adequate native water to meet both Colorado's needs and its Compact delivery obligations to downstream States. Similarly, New Mexico relies on water transferred by the San Juan-Chama Project from Colorado to receive its full entitlement to water under the Upper Colorado River Compact, S. Con. Res. 790, 81st Cong., 63 Stat. 31 (1949). New Mexico, in turn, uses this Colorado River Basin water to satisfy needs in the Rio Grande Basin, which often lacks sufficient water supplies, thus ensuring that the State has adequate native water to meet its delivery obligations to Texas under the Rio Grande Compact, H. Con. Res. 4997, 76th Cong., 53 Stat. 785 (1939).

Altering the federal-state framework would improperly override such interstate allocations, without a clear and manifest statement from Congress that it intended to do so.

CONCLUSION

For the foregoing reasons, the Court should grant the Petitions for a Writ of *Certiorari*.

Respectfully submitted,

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